83-467

NO.

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1983

ROBERT PAULSON and CELESTE PAULSON, husband and wife; ERNEST POSICK and DONNA POSICK, husband and wife; GEORGE PARIS and THELMA PARIS, husband and wife; VELDON STARGEL and GLADYS STARGEL, husband and wife; and RITA HARRIS. . . . . .Appellant

v.

THE COUNTY OF PIERCE. . . . . .Appellee

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

JURSIDICTIONAL STATEMENT

JAMES F. LEGGETT
LEGGETT & KRAM
2025 FIRST INTERSTATE PLAZA
TACOMA, WASHINGTON 98402
(206)272-7929
Attorney for Appellant

NO.

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2025 FIRST INTERSTATE PLAZA
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Attorney for Appellant

I. QUESTION PRESENTED

Does RCW 86.12.037 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because there is no reasonable basis for providing immunity to counties for negligent design, construction and maintenance of dikes on rivers where the State of Washington and all other political subdivisions thereof, including multi-county diking districts, are subject to liability for the same conduct?

II. PARTIES

The decision appealed was rendered by the Supreme Court of the State of Washington and appeal is taken only as to the Appellee, the County of Pierce, which was represented below by F. ROSS BURGESS of Burgess, Kennedy & Fitzer, P.S., 201 St. Helens, Tacoma, Washington 98402, (206)572-5324. 28 U.S.C. §2403 may be applicable.

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IV. OPINIONS BELOW

The Opinion of the Supreme Court of the State of Washington, from which the Appellants Paulson et al appeal appears in the Appendix hereto, pages 15 through 41, infra, and is reported at 664 P.2d 1202.

The judgment of the Supreme Court of the State of Washington, reversing Appellant's judgement on Jury Verdict against the County of Pierce for negligent design, construction and maintenance of a dike along the Nisqually River, was entered 26 May, 1983. Appellant timely filed a Motion for Reconsideration and Re-hearing on 6 June, 1983, which was denied by Order Denying Motion for Reconsideration entered on 30 June, 1983.

Appellants timely filed a Notice of Appeal to the United States Supreme Court with the Clerk of that Court and the Clerk of the Supreme Court of the State of Washington and the Clerk of the Superior Court in and for the County of Pierce on 19 August, 1983. This same notice was sent to the Attorney General of the State of Washington who was not a party to this action, but who may have an interest pursuant to 28 U.S.C. §2403(b).

This Appeal is being docketed in this Court within ninety (90) days from the entering of the opinion of the Supreme Court of the State of Washington and the entry of the Order Denying Appellants' Motion for

Reconsideration and for Re-hearing. The Notice of this Appeal accompanied by the docket fee was received by the Office of the Clerk of the Supreme Court of the United States on 23 August, 1983. The original Jurisdictional Statement on Appeal from the Supreme Court of the State of Washington was received by the Office of the Clerk of the Supreme Court of the United States on 21 August, 1983, with this amended version submitted to correct errors of form in accordance with Supreme Court Rule 33.7.

V. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) as applied in Huffman v. Pursue, Ltd., Ohio 1975, 95 S. Ct. 1200, 420 U.S. 592, 43 L. Ed. 2d 482, rehearing denied 95 S. Ct. 1969, 421 U.S. 971, 44 L. Ed. 2d 463.

VI. UNITED STATES CONSTITUTIONAL PROVISION

Amendment XIV of the Constitution of the United States: (Equal Protection) §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPLICABLE STATUTES

The most germane statutory provisions applicable to this appeal and contained in the Revised Code of Washington are cited below in pertinent part:

RCW 86.12.037: Liability of County or Counties to Others:

> No action shall be brought or maintained against any county alone or when acting jointly with any other county under any law, its or their agents, officers or employees, for any noncontractual acts or omissions of such county or counties, its or their agents, officers or employees, relating to the improvement, protection, regulation and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks and waters thereof: Provided, that nothing contained in this section shall apply to or affect any action now pending or begun prior to the passage of this section. [Enacted Laws 1921 ch 185 §1 P 747]

RCW 4.92.090 Tortious Conduct of State - Liability for Damages:

> The State of Washington, whether acting in its governmental or

proprietary capacity shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. [Amended by Laws 1963 ch 159§2].

RCW 4.96.010 Tortious Conduct of Political Subdivisions, Municipal Corporations and Quasi Municipal Corporations-Liability for Damages:

All political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietory capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents or employees to the same extent as if they were a private person or corporation: Provided, that the filing within the time allowed by law of any claim required shall be a condition precedent to the maintaining of any action. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory [Enacted Laws 1977 ch 164 § 1.]

RCW 86.05.920 Repeal of RCW 86.05.010 through 86.05.910 - Saving - Option to Conform to Chapter 86.09 - Validation:

Sections 1 through 79, Chapter 160, Laws of 1935 Section 1, Chapter 82,

Laws of 1949, Section 1, Chapter 20, Laws of 1953 and RCW 86.05.010 through 86.05.910 are repealed: Provided, that districts heretofore established pursuant to said laws may continue to be operated and maintained as provided therein (except that the tort liability immunity provided for in section 32, ch 160, Laws of 1935 and RCW 86.05.323 shall no longer apply).

RCW 86.05.323 Powers and Status as Public Corporations - Immunity From Tort Liability:

Any flood control district created under this chapter shall constitute a body corporate and shall possess all the usual powers of a corporation for public purposes as well as all powers that may now or hereafter be conferred by law, and shall not be liable for the torts of its officers, agents and employees. No action shall be brought or maintained against any flood control district, its agents, officers or employees, for any noncontractual acts or omissions of such flood control district, its officers, agents or employees. Any flood control district created under chapter shall be a political subdivision of the State and shall be held and construed to be a municipal corporation within the provisions of the state constitution relating to exemption from taxation and within its provisions relating to the debt limits of municipal corporations.

RCW 86.09.048 District's Corporate Powers - Immunity from Tort Liability:

> A flood control district created under this chapter shall constitute a body corporate and shall possess all the usual powers of a corporation for public purposes as well as all powers that may now or hereafter be conferred by law, and shall not be liable for the torts of their officers, agents and servants.

RCW 86.09.048 District's Corporate Powers:

> A flood control district created under this chapter shall constitute a body corporate and shall possess all the usual powers of a corporation for public purposes as well as all powers that may now or hereafter be conferred by law. [Amended by Laws 1976 ch 164 § Line 9.]

RCW 89.30.121 District is Political Subdivision - Immunity From Tort Liability:

> Reclamation districts created under this chapter shall be political subdivisions of the State and shall be held and construed to be municipal corporations within the provisions of the state Constitution relating to exemptions from taxation and within the provisions relating to the debt limits of municipal corporations;

provided, that nothing herein contained shall be construed as a limitation on the general improvement and divisional districts, authorized herein, to contract obligations. Said reclamation districts shall not be liable for the torts of their officers, agents and servants.

RCW 89.30.121 District is Political Subdivision:

Reclamation districts created under this chapter shall be political subdivisions of the state and shall be held and construed to be municipal corporations within the provisions of the state Constitution relating to exemptions from taxation and within the provisions relating to the debt limits of municipal corporattions: Provided, that nothing herein contained shall be construed as a limitation on general improvement and divisional districts, authorized herein, to contract obligations. [Amended by Laws 1967 ch 164 § 10.]

VII. STATEMENT OF CASE

The appellants owned permanent residences and vacation cabins on a portion of the Nisqually River flood plain which had been segregated from the Nisqually River by a dike or berm designed, constructed and maintained by the Pierce County Engineering Department. The appellants had

purchased lots within a subdivision approved by the Pierce County Planning Department and erected the structures on the lots behind the dike.

On 2 December, 1977, the Nisqually River breached the dike and destroyed and/or substantially damaged the appellants' properties. Some homes were actually washed away. Subsequent investigation revealed that the County Engineering Department had failed to remove aggregate from the river bed, so that the dike which had originally been fifteen (15) feet above the river bed was less than eight (8) feet above the river bed at the time of the high water. A judgment on Jury Verdict was entered in favor of appellants and against the County of Pierce.

The appellee pled RCW 86.12.037 as an absolute bar to liability. The Trial Court found that RCW 86.12.037 had been impliedly repealed by the enactment of RCW 4.92.090 and 4.96.010. These tort claim statutes expressly repealed the statutes providing immunity to the State, municipalities, multi-county diking districts and reclamation districts. The Trial Court further based its grant of Summary Judgment Dismissing the Appellee's immunity defense on the reasoning of the Kansas Supreme Court in Flax v. Kansas Turnpike Authority, (1979), 226 Kan. 1, 596 P.2d 446, in that the preservation of immunity for a county, where all other subdivisions of the state and the state itself, were subject to liability for the same

conduct, would violate the Equal Protection provisions of the Fourteenth Amendment to the United States Constitution.

The County of Pierce appealed to Division II of the Washington State Court of Appeals, which on appellants' motion, certified the implied repeal and constitutional questions to the Washington State Supreme Court. The Washington Supreme Court found in favor of the County of Pierce on both questions and appellants seek review of the Constitutional question by this High Court.

VIII. THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this case is so substantial as to require plenary consideration by this High Court, with briefs on the merits and oral argument for its resolution. This case presents this Court with the opportunity to reconcile conflicting interpretation and application of the Equal Protection provision of the Fourteenth Amendment to the Constitution of the United States by the highest Courts of the states of Kansas and Washington. There is no precedent on this question from this High Court. Appellants have been deprived of damages for the loss of their homes by the arbitrary grant of immunity to the County of Pierce.

In Flax v. Kansas Turnpike Authority, supra, the Kansas Supreme Court found that the grant of immunity to the Kansas Turnpike Authority for negligent design, construction and maintenance of its roadways violated the Equal Protection Provision of the Fourteenth Amendment to the Constitution of the United States where the State of Kansas, counties and cities were liable for negligent design, construction and maintenance of roadways.

The legislature of the State of Washington regularly included tort immunity provisions in statutes enacted prior to 1935. In 1963 by enactment of RCW 4.92.090 and in 1977 by enactment of RCW 4.96.010, the Washington State

legislature joined the vanguard of states taking the lead of the U.S. Congress in recognizing the justice of allowing citizens injured by negligent acts of governmental agencies and employees to recover damages therefore. This also was a recognition that said agencies have available liability insurance to spread any risks involved, as does Pierce County.

RCW 4.96.010 specifically repealed all of the statutes providing immunity to political subdivisions for the State, for river control and improvement (RCW 86.05.920, 86.05.323, 86.09.048, 89.30.121) except RCW 86.12.037, although all provisions of RCW 86.12 except RCW 86.12.027 were re-enacted after the passage of RCW 4.96.010 and 4.92.090. The Washington Court of Appeals, in Sado v. Spokane, 22 Wn. App. 293 (1979) applied RCW 4.96.010 to the City of Spokane to find liability for negligent design, construction and maintenance of river embankment.

This case provides this High Court the opportunity to address and resolve a question which will continue to arise as more and more states adopt general tort liability statutes and to avoid the inconsistent interpretation and application of the United States Constitution by State Supreme Courts. Where two political subdivisions are treated differently in respect to liability, the rights of the citizens to seek redress are subject to the protections of the Equal Protection Clause of the Fourteenth Amendment to

the Constitution of the United States. There can be no reasonable state purpose in dictating that the injured appellants cannot recover for the negligently inflicted injuries to their persons and properties because the negligent party was a county rather than the state, a city, a reclamation district or multi-county diking district.

CONCLUSION

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code, probable jurisdiction should be noted, and plenary consideration of the question presented is appropriate.

Respectfully submitted,

James F. Leggett
Leggett & Kram
2025 First Interstate Plaza
Tacoma, Washington 98402
(206)272-7929

CERTIFICATE OF SERVICE

JAMES F. LEGGETT, a member of the Bar of the United States Supreme Court, whose entry of appearance in this cause has been filed with the Clerk of the United States Supreme Court, being first duly sworn and placed upon his oath states that forty copies of the Jurisdictional Statement addressed to the Clerk of the U.S. Supreme Court, Washington D.C. 20543 and three copies of the Jurisdictional Statement were deposited 19 August, 1983 in the U.S. Post office or mailbox with first-class postage, pre-paid, addressed to each of the persons set-forth below. Similarly, the same number of copies of this Jurisdictional Statement, corrected pursuant to Rule 33.7, addressed to the Clerk of the U.S. Supreme Court and to the same persons set-forth below, were deposited on September 15, 1983 in a U.S. Post Office or mailbox with first-class, postage prepaid:

Clerk of the Court
Supreme Court of the State of Washington
Temple of Justice
Olympia, WA. 98504

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JAMES F. LEGGETT

Sworn to before me this
15th day of September, 1983

Bonnie C. Huff
Notary Public
State of Washington
Certificate No. 0312156
Residing in Tacoma, Washington
Commission Expires February 23, 1987

APPENDIX

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

ROBERT PAULSON, et ux., et al,	)	
	)	No. 267, 086
Plaintiffs,	)	
	)	JUDGMENT ON
v.	)	GENERAL VER-
	)	DICT WITH
THE COUNTY OF PIERCE,	)	ANSWERS TO
	)	INTERROGATORIES
Defendants.	)	

I.

TRIAL

1.1 Date. 17 October 1980.

1.2 Jury. The court heard the matter with a jury.

1.3 Appearances. Plaintiffs appeared by JAMES F. LEGGETT and JOHN SWEET, their counsel. Defendant appeared by F. ROSS BURGESS and KAREN STROMBOM, its counsel.

1.4 Evidence. The jury having been sworn to try the case, oral, demonstrative and written evidence having been adduced on behalf of the various parties, and the jury having thereafter been instructed on the law, the jury deliberated and found in favor of the Plaintiffs.

II.

VERDICT

The jury rendered a general verdict for the Plaintiffs as set forth below and answered the interrogatories with answers that were consistent therewith.

ROBERT and CELESTE PAULSON	$ 8,190;
ERNEST and DONNA POSICK	35,168;
VELDON and GLADYS STARGEL	14,655;
GEORGE and THELMA PARIS	52,325;
RITA HARRIS	30,186.

The verdict was entered on 4 October, 1980.

III.
ADJUDICATION

On the basis of the foregoing verdict, It is Adjudged:

3.1 Money. Plaintiffs are awarded judgment against the Defendant PIERCE COUNTY in the amounts set forth below:

ROBERT and CELESTE PAULSON	$ 8,190;
ERNEST and DONNA POSICK	35,168;
VELDON and GLADYS STARGEL	14,655;
GEORGE and THELMA PARIS	52,325;
RITA HARRIS	30,186.

3.2 Interest. Plaintiffs are awarded interest on their respective amounts from the 18th day of January, 1980 until satisfied, at the statutory rate of 8 % per annum.

3.3 Costs. Plaintiffs shall have their costs herein, to include statutory attorney fees.

PRESENTED BY: (s) JAMES F. LEGGETT
JAMES F. LEGGETT

DONALD H. THOMPSON, Superior Ct. Judge

No. 49165-8. En Banc.

ROBERT PAULSON, ET AL, Respondents v. THE COUNTY OF PIERCE, Appellant, JOHN MELVIN, ET AL, Respondents.

[1] Statues -- Repeal -- By Implication -- Express Repeals -- Effect. Implied statutory repeals are disfavored, particularly when the purported repealing statute contains a schedule of acts repealed which does not include the purported repealed statute.

[2] Statutes -- Construction -- Legislative Intent -- Legislative History. A court may resort to extrinsic aids such as legislative history to ascertain the Legislature's intent in enacting an ambiguous statute.

[3] Counties -- Levees and Flood Control -- Statutory Immunity -- Implied Repeal. RCW 4.92.090 and 4.96.010, which abrogate sovereign immunity for political subdivisions of the State, do not impliedly repeal the immunity granted counties by RCW 86.12.037 for noncontractual acts and omissions involving flood control

[4] Constitutional Law -- Equal Protection -- Classifications -- Rational Relationship -- Burden of Proof. A statute which neither creates a suspect classification nor affects a fundamental right is given only minimum scrutiny in

determing whether it violates the equal protection clause. Under that standard, the statute is presumed to be constitutional and the party challenging it has a heavy burden of showing that there is no reasonable basis for the classification or that the classification is contrary to the purpose of the statute.

[5] Counties -- Levees and Flood Control -- Statutory Immunity -- Validity. RCW 86.12.037, which immunized counties from liability for noncontractual acts and omissions involving flood control, does not violate the equal protection guaranty.

[6] Joint Ventures -- Elements -- Shared Control. The existence of a joint venture requires an equal right of control among the parties.

Rosellini and Pearson, JJ., did not participate in the disposition of this case.

Nature of Action: Landowners whose cabins were damaged by a flood sought damages from the county which had constructed a dike as a flood control measure and from the developer which had sold them their lots.

Superior Court: After dismissing the developer, the Superior Court for Pierce County, No. 267086, Donald H. Thompson, J., on January 18 and October

17, 1980, entered judgments on verdicts finding the county liable and awarding damages.

Supreme Court: Holding that the county's statutory immunity from liability resulting from efforts at flood protection was not impliedly repealed, that the immunity granted did not violate the equal protection clause, and that the developer had not engaged in a joint venture with the county, the court reverses the judgments in favor of the plaintiffs.

Karen L. Strombom, F. Ross Burgess, and Burgess,Kennedy & Fitzer, P.S., for appellant.

James F. Leggett, for respondents Paulson, et al.

Burton C. Waldo, Keller, Rohrback, Waldo, Hiscock, Butterworth & Fardal, James E. O'Hern, and Gordon Thomas, Honeywell, Malanca, Peterson & O'Hern, for respondents Melvin, et al.

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FILED IN CLERKS OFFICE,
SUPREME COURT, STATE OF WASHINGTON
May 26, 1983
BY: WILLIAM H. WILLIAMS
CHIEF JUSTICE

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

ROBERT PAULSON and CELESTE PAULSON, husband and wife; ERNEST POSICK and DONNA POSICK, husband and wife; GEORGE PARIS and THELMA PARIS, husband and wife; VELDON STARGEL and GLADYS STARGEL, husband and wife; and RITA HARRIS,	)	No. 49165-8
Respondents,	)	En Banc
v.	)	
THE COUNTY OF PIERCE,	)	
Appellant.	)	
JOHN MELVIN and MARGARET MELVIN, husband and wife; EDWARD MELVIN and CHAROLOTTE MELVIN, husband and wife, E. STANLEY HALL and MARY HALL, husband and wife; MARGARET FULLINWIDER, d/b/a RECREATION PROPERTIES,	)	Filed:
Respondents.	)	26 May 1983

The Nisqually River is one of 10 major river systems in the Puget Sound area. The Nisqually River basin encompasses a drainage area of approximately 712 square miles in Pierce, Thurston, and Lewis Counties. The eastern portion of the basin is rugged and irregular and reaches an elevation of 14, 408 feet at the summit

of Mt. Rainier. From the town of LaGrande west to Puget Sound, the basin is generally below 1,000 feet elevation and is characterized by rolling foothills broken by occasional gravelly prairies and shallow lakes. Most of the basin is heavily forested.

The Nisqually River flood plain covers approximately 9,000 acres. The narrow flood plain above Alder Reservoir suffers frequent flooding. The steep gradient of the river results in high velocity flows that carry large quantities of gravel, logs, and other debris. During high flows, heavy deposits of bed load and debris fill the channel and force the river to spread over the valley floor. See generally Puget Sound Task Force--Pacific Northwest River Basin Comm'n, Comprehensive Study of Water and Related Land Resources, Puget Sound and Adjacent Waters, app. 12, at 2-1, 10-1 through 10-17 (1970).

In 1961 Pierce County constructed a dike 3,3000 feet long on the north side of the Nisqually River just outside the border of Mt. Rainier National Park. The dike was extended by the County in 1968 and 1971. The County has continued to maintain the dike, inspecting it periodically and, when necessary, adding rock and riprap to its face.

Plaintiffs are Pierce County residents who own cabins behind the Nisqually River dike in a subdivision known as Nisqually Park. Nisqually Park was platted on property

homesteaded by the parents of Margaret Fullinwider and E. Stanley Hall. Plaintiffs purchased the lots on which their cabins were built from defendants Melvin, Hall, and Fullinwider, doing business as Recreation Properties (hereinafter defendants Melvin, Hall and Fullinwider will be referred to collectively as Recreation Properties).

On December 2, 1977, due to flooding caused by record rainfall and melting of the Nisqually Glacier on Mt. Rainier, a portion of the Nisqually River dike was breached by the river. The floodwaters caused extensive damage to plaintiffs' cabins along the river.

On June 9, 1978, plaintiffs filed on this action against Pierce County and against Recreation Properties. Plaintiffs' motion to certify as a class action was denied and defendants' motion to dismiss suit as a class action was granted. The Pierce County Superior Court bifurcated the issues of liability and damages for trial.

A jury trial on the issue of liability began on November 7, 1979, and concluded on December 27, 1979. At the conclusion of plaintiffs' case the trial court dismissed the action against defendant Recreation Properties. The jury found for the plaintiffs against Pierce County, and the Superior Court entered a judgment on January 18, 1980. Subsequently, a jury trial was held on the issue of damages; the judgment was entered on October 17, 1980.

Defendant Pierce County seeks review of judgments rendered against it in a Pierce County Superior Court trial bifurcated on the issues of liability and damages. Division Two of the Court of Appeals certified the case to the Supreme Court for direct review. See RCW 2.06.030(d). We accepted certification to consider the following question:

> Whether RCW 86.12.037, which grants statutory immunity to counties for noncontractual acts and omissions relating to flood protection, was impliedly repealed by RCW 4.92.090 and RCW 4.96.010, which abrogate common law statutory immunity.

We hold RCW 86.12.037 was not impliedly repealed by RCW 4.92.090 and 4.96.010. Furthermore, we hold RCW 86.12.037 does not violate the equal protection clauses of U.S. Const. amend. 14 and Const. art. 1, § 12. We reverse the trial court's rulings and vacate the judgments rendered against defendant Pierce County.

RCW 86.12.020 authorizes counties to construct and maintain dikes, levees, and other improvements to protect against floods. RCW 86.12.037 declares:

> No action shall be brought. . . against any county. . . for any noncontractual acts or omissions. . . relating to the improvment, protection, regulation and control for flood prevention and navigation

> purposes of any river or its tributaries and the beds, banks and waters thereof. . .

RCW 86.12.037 was enacted by the Legislature in 1921 to shield counties from liability for their efforts to protect the public from flood damage. See Short v. Pierce Cy., 194 Wash. 421, 430-31, 78 P.2d 610 (1938). RCW 86.12.037 provides immunity to counties even where their negligence in the construction and maintenance of flood control devices results in damage to private property during floods or other periods of high water. Short, 194 Wash. at 431.

While it is clear there has been no explicit repeal, plaintiffs contend RCW 86.12.037 was impliedly repealed by RCW 4.92.090 and RCW 4.96.010. RCW 4.92.090 reads as follows:

> The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090 applies to political subdivisions of the State, whose sovereign immunity is derived from the States' sovereign immunity. Kelso v. Tacoma, 63 Wn.2d 913, 916, 390 P.2d 2 (1964). Likewise, RCW 4.96.010 declares:

> All political subdivisions,

> municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietary capacity shall be liable for damages arising out of their tortious conduct. . . to the same extent as if they were a private person or corporation. . .

Implied repeals of statutes are disfavored by Washington courts. E.g., U.S. Oil & Ref. Co. v Department of Ecology, 96 Wn.2d 85, 88, 633 P.2d 1329 (1981); Jenkins v. State, 85 Wn.2d 883, 886, 540 P.2d 1363 (1975); Tardiff v. Shoreline Sch. Dist., 68 Wn.2d 164, 166, 411 P.2d 889 (1966). Ordinarily, a general statute does not repeal an earlier special statute by implication. U.S. Oil Ref. Co. v. Department of Ecology, supra; Herrett Trucking Co., v. Washington Pub. Serv. Comm'n, 58 Wn.2d 542, 543, 364 P.2d 505 (1961). An implied repeal will only be found where:

> (1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction.

In re Chi-Dooh Li, 79 Wn.2d 561, 563 488 P.2d (1971), quoted in U.S. Oil

& Ref. Co. V. Department of Ecology, supra at 88.

When determining the intent of a legislative enactment, the meaning of a plain and unambiguous statute must be derived from the wording of the statute itself. In re Lehman, 93 Wn.2d 25, 27, 604 P.2d 948 (1980); Garrison v. State Nursing Bd., 87 Wn.2d 195, 550 P.2d 7 (1976). Where a statute is ambiguous, however, or where the language is unclear, we may resort to extrinsic aids such as legislative history to discern legislative intent. State v. Grays Harbor Cy., 98 Wn.2d 606, 607, 656 P.2d 1084 (1983); Whitehead v. Department of Social & Health Servs., 92 Wn.2d 265, 268, 595 P.2d 926 (1979). We believe there has been no implied repeal of RCW 86.12.037 under the test in In re Chi-Dooh Li, supra. Even assuming, however, there is some statutory ambiguity, we believe the lack of legislative intent to repeal RCW 86.12.037 is confirmed by the examination of legislative history of the statutes.

In 1961 common law doctrine of sovereign immunity was abrogated by the Legislature. Laws of 1961, ch. 136 § 1, p. 1680; RCW 4.92.090. In 1964, in Kelso v. Tacoma, supra, we held RCW 4.92.090 applies to all political subdivisions of the State. See Kelso, 63 Wn.2d at 916-17. On a subsequent occasion, however, the court ruled RCW 4.92.090 did not impliedly repeal specific statutory limitations on the liability of a subdivision of the State

for tortious conduct. E.G., Tardiff v. Shoreline Sch. Dist., 68 Wn2d 164, 167, 411 P.2d 889 (1966).

As a response, the Legislature in 1967 explicitly abrogated the doctrine of sovereign immunity as it relates to political subdivisions of the State, Laws of 1967 ch. 164, §1, p.792, codified in RCW 4.96.010. Moreover, the Legislature repealed former RCW 28.58.030, successfully asserted by defendant in Tardiff as the basis for its sovereign immunity. Laws of 1967, ch. 164, § 16, p. 804. See Tardiff, 68 Wn.2d at 167, 169. Even so, soon after passage of Laws of 1967, ch. 164, § 1, p. 792, we again ruled RCW 4.92.090 did not repeal a specific statutory immunity. Chappel v. Franklin Pierce Sch. Dist. 402, 71 Wn.2d 17, 21, 426 P.2d 471 (1967).

In the present case, in light of Chappel and Tardiff and legislative history, the Superior Court incorrectly determined RCW 86.12.037 was impliedly repealed by RCW 4.92.090. RCW 4.96.010 provides even less support for plaintiffs' argument and the superior court decision. Laws of 1967, ch. 164, § 16, p. 804 contained a list of statutes repealed by the measure. While the implied repeals of statutes are disfavored by Washington courts, the disinclination to repeal by implication is especially acute when, as here, a later act contains a schedule of statutes repealed and the schedule does not include the statute under consideration. Washington State

Welfare Rights Org. v. State, 82 Wn.2d 437, 439, 511 P.2d 990 (1973). Accord, State ex rel. Spokane v. DeGraff, 143 Wash. 326, 331, 255 P. 371 (1927) (principle of implied repeal inapplicable where an act contains schedule of acts repealed). See 1A C. Sands, Statutory Construction § 23.11 (4th ed. 1972). We hold RCW 86.12.037 was not impliedly repealed by RCW 4.92.090 or RCW 4.96.010.

In claiming an equal protection violation, plaintiffs note that in Sado v. Spokane, 22 Wn. App. 298, 588 P.2d 1231 (1979) the Court of Appeals held the City of Spokane liable under RCW 4.96.010 for its negligence in the construction and maintenance of a flood control embankment. Plaintiffs argue that, assuming the court finds that RCW 86.12.037 was not repealed by RCW 4.92.090 or RCW 4.96.010, the grant of sovereign immunity for counties but not for municipal corporations violates the equal protection clauses of the Washington and United States Constitutions.

As authority for this proposition, plaintiffs cite Flax v. Kansas Turnpike Auth., 226 Kan. 1, 596 P.2d 446 (1979). In Flax the Kansas Supreme Court ruled the governmental immunity statute disallowing tort actions against the Kansas Turnpike Authority violated the equal protection clause since cities and counties in the state did not enjoy the same immunity. Flax, 225 Kan. at 7-8.

At the outset of any equal protection analysis, we must identify the appropriate standard of judicial scrutiny. If a statute creates an inherently suspect classification such as one based on race, nationality, or alienage, the statute, when challenged, will be subjected to strict scrutiny. Graham v. Richardson, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971); Nielsen v. Washington State Bar Ass'n, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978). A statue which does not affect fundamental rights or create a suspect classification, however, is generally subjected to minimal judicial scrutiny and will not be invalidated unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective. McGowan v. Maryland, 366 U.S. 420, 425-26, 6 L. ED. 2d 393, 81 S. Ct. 1101 (1961); Neilson v. Washington State Bar Ass'n., supra.

Certainly the classification of person barred from recovery under RCW 86.12.037 is not based on race, nationality, alienage, or any other inherently suspect classification. Likewise, RCW 86.120.037 does not affect fundamental rights. The statute does not prohibit recovery under U.S. Const. amends. 5 or 14 or Const. art. 1, § 16 where a person's property is taken for a public purpose by a county in the exercise of its police powers. Short v. Pierce Cy., 194 Wash. 421, 435-36, 78 P.2d 611 (1938). See Conger v. Pierce Cy., 116 Wash. 27, 35, 198 P. 377 (1921). Federal courts consistently have held the federal

constitution does not imply a right of action for damages against the government. E.g., Duarte v. United States, 532 F.2d 850, 852 (2d Cir. 1976); Boyce v. United States, 523 F. Supp. 1012, 1016 (E.D.N.Y. 1981).

Given the foregoing analysis, RCW 86.12.037 need only meet the minimum scrutiny test to pass constitutional muster. Under the minimum scrutiny approach, the reviewing court must determine (1) whether the legislation applies alike to all members within the designated class; (2) whether there are reasonable grounds to distinguish between those within and those without the class; and (3) whether the classification has a rational relationship to the purpose of the legislation. Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs., 92 Wn.2d 831, 835-36, 601 P.2d 936 (1979). Under the minimum scrutiny analysis, a challenged statute is presumed constitutional and the party challenging it has a heavy burden of showing there is no reasonable basis for the classification or that the classification is contrary to the purpose of the legislation. Deputy Sheriff's Ass'n, 92 Wn.2d at 836.

In the present case, we conclude the burden of showing the unconstitutionality of RCW 86.12.037 has not been met. The statute implicitly creates a class of landowners whose property might be damaged as a result of a county's flood control activities. RCW 86.12.037

precludes recovery by all those within the designated class.

Furthermore, there exist reasonable grounds to distinguish between counties and other political subdivisions of the State (i.e., cities and towns.). In Aubertin v.Board of Cy. Comm'rs, 588 F.2d 781 (10th Cir. 1978), the federal court explained the reasons for granting immunity to a county from liability for negligent maintenance of public works while denying a municipality the same immunity:

> [T]he maintenance of city streets, which are in a relatively confined area, is different from the maintenance of county roads, which sprawl all over the countryside. The difficulties which may be encountered in discovering and correcting defects in the latter could rationally have been expected to be greater than those which might be encountered in the former.

Aubertin, 588 F.2d at 785.

Similarly, the difficulties inherent in constructing and maintaining flood control measures are greater for counties in Washington than for municipalities. For example, there are approximately 54 miles of river bed in the 100-year flood plain areas of the Nisqually and Puyallup Rivers in Pierce County. In contrast, less than 1 mile of riverbed exists within a 100-year flood plain in an incorporated area in Pierce County. See Puget Sound

Task Force--Pacific Northwest River Basins Comm'n, Comprehensive Study of Water and Related Land Resources, Puget Sound and Adjacent Waters, app. 12, at 9-2, 10-2 (1970).

Finally, there exists a rational relationship between the classification created by RCW 86.12.037 and the purpose of the statute. As previously stated, RCW 86.12.037 was enacted to encourage counties to engage in flood control activities. See Short v. Pierce Cy., supra. Shielding counties from liability for undertaking flood control activities prevents the costs of flood damages which will inevitably recur from being added to the cost of constructing the facilities. See National Mfg. Co., v. United States, 210 F.2d 263, 270 (8th Cir. 1954).

Both plaintiffs and defendant raise a number of other issues on appeal and cross appeal. Since we rule that RCW 86.12.037 precludes recovery from the County, except for one matter these issues need not be reached. The issue which must be considered is whether the members of Recreation Properties were joint venturers with Pierce County in the location and construction of the dike. We agree with the trial court there was no joint venture and its dismissal of Recreation Properties on the basis of lack of evidence is upheld.

The essential elements of a joint venture are (1) a contract, express or implied, (2) a common purpose; (3) a

community interest; (4) an equal right to a voice, accompanied by an equal right to control. Carboneau v. Peterson, 1 Wn.2d 347, 374, 95 P.2d 1043 (1939); Gleason v. Metropolitan Mortgage Co., 15 Wn. App. 481, 493, 551 P.2d 147 (1976). An ownership or proprietary interest in the subject matter of the enterprise by all parties is not essential to creation of a joint venture. Gleason v. Metropolitan Mortgage Co., supra.

As stated by the trial court:

> I think the claim against [Recreation Properties] on the basis of a joint venture has to fail on the basis that there is no showing that the defendants had any control. I think it is quite clear that the County exercised exclusive control over the design, installation, maintenance, everything to do with the dike and the revetment.

25 Report of Proceedings, at 44. We have examined the evidence relied upon by plaintiffs to establish the joint venture and agree with the position of the trial court that Recreation Properties had no control over the diking enterprise of Pierce County.

Reversed.

Williams, C.J.	Dolliver, J.
Brachbenbach, J.	Dore, J.
Dimmick, J.	Utter, J.
Soderland, J. Pro Tem	

NO. 5089-II

SUPREME COURT OF THE STATE
OF WASHINGTON

THE COUNTY OF PIERCE,

Appellant,

vs.

ROBERT PAULSON and CELESTE PAULSON, husband and wife; ERNEST POSICK and DONNA POSICK, husband and wife; GEORGE PARIS and THELMA PARIS, husband and wife; VELDON STARGEL and GLADYS STARGEL, husband and wife; and RITA HARRIS,

Respondents.

MOTION FOR RECONSIDERATION
AND
RE-HEARING

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Cross-Appellants

THE LAW OFFICES OF
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COMES NOW the Respondents in the above-entitled matter and respectfully moves this Court for reconsideration of its ruling issued on 26 May, 1983 in the above-entitled matter. This reconsideration is sought pursuant to RAP 12.4 for the purpose of clarifying the Court's opinion regarding its finding that RCW 86.12.037 is not in violation of the Equal Protection provisions of the United States Constitution. The grounds for this motion are that the Court has failed to address the pattern of liability created by RCW 4.96.010 and RCW 4.92.090 as follows:

1. At the time of the events giving rise to this action and at the time of trial, Pierce County was not a "Chartered Township" under Amendment 21 to Article XI § 4 of the Washington State Constitution and as such remained a sub-division of the State. A part can have no more (immunity) than the whole.

2. Under the minimum scrutiny test: (a) Whether the legislation applies alike to all members within the designated class; (b) Whether there are reasonable grounds to distinguish between those within and those without the class; and (c) Whether the classification has a rational relationship to the purpose of the legislation, the preservation of RCW 86.12.037 preserves a class of governmental sub-division which is immune for an

activity "diking", for which all other sub-divisions are liable. Aubertin v. Board of County Comm'n., 588 F.2d, 781 (10th Cir. 1978) relied on by this Court in its ruling is not in point as the rationale for preserving immunity was that the activities relating to county roads posed much greater difficulties and expense than the duties in maintaining city streets. This is not the issue before this Court nor was it the issue before the Kansas Supreme Court in Flax v. Kansas Turnpike Authority, 226 Kan. 1, 596 P.2d 446 (1979).

3. In the case at bar, as in the Flax v. Kansas Turnpike Authority case, all sub-divisions of the State including the State itself are liable for a certain activity (design and maintenance of highways in the Flax case and diking in the instant case). The State of Washington is involved in diking activities throughout the State and in fact had been a Defendant below but had settled before the case went to trial. No affirmative defense was raised by the State of Washington as to any immunity and in fact any immunity that existed to the State of Washington was repealed by the enactment of RCW 4.92.090. Pierce County, as a member of the White River Diking District, a multi-county diking district, is liable for the same activities as this Court has found to be immune, by merely being

involved on a different river within the County. That Diking District immunity Statute, RCW 86.05.323, was repealed by RCW 4.96.010. The immunity of Reclamation Districts for diking, RCW 86.09.148 and RCW 89.30.121, was also repealed by enactment of RCW 4.96.010. Sado v. Spokane, 22 Wn. App. 298, 588 P.2d 1231 (1979) stands for the waiver of immunity as to cities for diking activities by enactment of RCW 4.96.010.

Based upon the foregoing matters, which were contained in Respondents' Brief on Appeal and previously argued before this Court, but not having been addressed in the formal opinion or the issues considered, Respondent respectfully requests this Court to reconsider its decision in the above-entitled matter and/or amend its opinion so as to address these issues so that the matter may be set in proper form for further review.

RESPECTFULLY submitted this 1st day of June, 1983

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Attorneys-at-Lay

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THE STATE OF WASHINGTON

ROBERT PAULSON, ET AL, No. 49165-8

Respondents,

v.

THE COUNTY OF PIERCE

Appellant,

JOHN MELVIN, ET AL,

Respondents.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having unanimously decided that the motion for reconsideration of the respondent Paulson, et al, should be denied,

It is ordered that the motion be and hereby is denied.

DATED this 30th day of June, 1983

WILLIAM H. WILLIAMS
CHIEF JUSTICE

IN THE

SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1983

ROBERT PAULSON and CELESTE PAULSON, husband and wife; ERNEST POSICK and DONNA POSICK, husband and wife; GEORGE PARIS and THELMA PARIS, husband and wife; VELDON STARGEL and GLADYS STARGEL, husband and wife; and RITA HARRIS Appellants, v. THE COUNTY OF PIERCE Respondent.	NOTICE OF APPEAL FROM THE SUPREME COURT OF WASHINGTON

COME NOW the Appellants, above-named, and hereby file their appeal of the Judgment of the Supreme Court of the State of Washington entered on 26 May, 1983 and Denial of Motion for Reconsideration entered on 30 June, 1983, under Cause Number 5089-II & 49165-8, pursuant to 28 U.S.C. 1257(2). In accordance with CR28(4)(c), Appellants state that 28 USC§2403(b) may be applicable and a copy of this pleading is being served upon the Attorney General for the State of Washington.

Appellants hereby enter their appearance by their attorney of record, JAMES F. LEGGETT, duly admitted to practice before this Court on 5 October, 1981, and enclose herewith the docketing fee of $300.00 pursuant to Rule 45.

This appeal is taken as to the County of Pierce, Appellant below, and specifically as to that portion of the judgment of the Supreme Court of the State of Washington upholding RCW 86.12.037 as against a challenge based upon the Equal Protection Clause of the 14th Amendment to the United States Constitution.

Dated this 19th day of August, 1983

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Office-Supreme Court, U.S.
FILED
OCT 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-467

In The
Supreme Court of the United States
October Term, 1983

ROBERT PAULSON and CELESTE PAULSON, husband and wife; ERNEST POSICK and DONNA POSICK, husband and wife; GEORGE PARIS and THELMA PARIS, husband and wife; VELDON STARGEL and GLADYS STARGEL, husband and wife, and RITA HARRIS,

Appellants,

vs.

THE COUNTY OF PIERCE,

Appellee.

Appeal from the Supreme Court of the State of Washington

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether appellant complied with the Rules of the Supreme Court of the United States.

2. Whether Wash. Rev. Code § 86.12.037 creates an improper classification.

3. Whether Wash. Rev. Code § 86.12.037 is rationally related to a legitimate governmental purpose and therefore not violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

4. Whether a conflict exists regarding the constitutionality of Wash. Rev. Code § 86.12.037.

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No. 83-467

In The

Supreme Court of the United States

October Term, 1983

ROBERT PAULSON and CELESTE PAULSON, husband and wife; ERNEST POSICK and DONNA POSICK, husband and wife; GEORGE PARIS and THELMA PARIS, husband and wife; VELDON STARGEL and GLADYS STARGEL, husband and wife, and RITA HARRIS,

Appellants,

vs.

THE COUNTY OF PIERCE,

Appellee.

Appeal from the Supreme Court of the State of Washington

MOTION TO DISMISS OR AFFIRM

Appellee Pierce County respectfully moves the Court pursuant to Rule 16 of the Rules of the Supreme Court to dismiss the appeal for failure to take this appeal in compliance with the rules of the Court and for want of a substantial federal question. In the alternative, appellee moves the Court to affirm the judgment of the Supreme Court of the State of Washington on the grounds that:

1. The decision of the Washington State Supreme Court, on the question presented, was carefully considered and is correct.

2. There is no conflict of decisions among the Courts of Kansas and Washington on this issue.

IDENTIFICATION OF PARTIES

Robert and Celeste Paulson, Ernest and Donna Posick, George and Thelma Paris, Veldon and Gladys Stargel, and Rita Harris, appellants, are property owners in Pierce County. The County of Pierce, appellee, is a Washington municipal corporation.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, included as an appendix to appellants' jurisdictional statement is reported at 99 Wash. 2d 645, 664 P. 2d 1202 (1983). The Court's Order Denying Motion for Reconsideration is not reported, but is also contained in the appendix to the jurisdictional statement.

JURISDICTION

Appellants assert that jurisdiction for their appeal to this Court is conferred by 28 U. S. C. § 1257 (2). This

appeal raises the question of the constitutionality of § 86.12.037 of the Revised Code of Washington, as fully set forth hereafter.

IMPLICATED CONSTITUTIONAL PROVISION

U. S. Const., Amend. XIV § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Wash. Rev. Code § 4.92.090.

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

Wash. Rev. Code § 4.96.010.

> All political subdivisions, municipal corporations, and quasi-municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents

or employees to the same extent as if they were a private person or corporation: *Provided,* That the filing within the time allowed by law of any claim required shall be a condition precedent to the maintaining of any action. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

Wash. Rev. Code § 86.12.037.

Liability of county or counties to others. No action shall be brought or maintained against any county alone or when acting jointly with any other county under any law, its or their agents, officers or employees, for any noncontractual acts or omissions of such county or counties, its or their agents, officers or employees, relating to the improvement, protection, regulation and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks and waters thereof: *Provided,* That nothing contained in this section shall apply to or affect any action now pending or begun prior to the passage of this section.

STATEMENT OF THE CASE

In 1961, appellee Pierce County constructed a dike on the Nisqually River. In subsequent years it enlarged and maintained the dike. Appellants are Pierce County residents who owned property behind the Nisqually River Dike. On December 2, 1977, a portion of the Nisqually River Dike was breached due to flooding, causing damage to appellants' property. Appellants commenced action against Pierce County.

At trial, Pierce County asserted that it was immune from prosecution under Wash. Rev. Code § 86.12.037. The trial court held that the legislature had overruled § 86.12.037 by implication. The jury subsequently found for appellants and against Pierce County. Pierce County appealed and the Washington Supreme Court reversed the trial court on grounds that, *inter alia*, § 86.12.037 was not impliedly overruled by Wash. Rev. Code §§ 4.92.090 and 4.96.010, and that it did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution even though it conferred immunity on counties but not other governmental bodies. Appellants are appealing that ruling.

ARGUMENT

I. Appellant Has Failed to Comply With the Rules of the Supreme Court.

Pursuant to Rule 16.1 (a) & (d), appellee asserts that the Court should dismiss this appeal because appellants have failed to comply with the Rules of the Supreme Court in the following respects:

1. The appellants have appended to their jurisdictional statement a faulty and irrelevant document entitled "Judgment on General Verdict With Answers to Interrogatories" in violation of Rule 15.1 (j) (i). A true and correct version of the trial court's Judgment on the Verdict is attached to this motion at Appendix A.

2. In violation of Rule 28.5, neither appellants' "Notice of Service of Notice of Appeal From the Supreme Court of the State of Washington" nor their "Certificate of Service of Jurisdictional Statement" either contains or is accompanied by a statement that all parties required to be served have been served.

II. Appellant Has Failed to Identify a Recognizable Class of Persons Subject to Disparate Treatment.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution announces a fundamental principle: The State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979). The Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others. *Jones v. Helms*, 452 U.S. 412, 423-24 (1980). Most frequently, claims of denial of equal protection of the laws are asserted by the members of a class of persons easily defined by a characteristic such as race, sex, alienage, illegitimacy, or religion. *Id.* at 424 n. 23.

Appellants have failed to show the existence of a recognizable class. Wash. Rev. Code § 86.12.037 applies equally to all residents of the State of Washington. Nothing in appellants' argument or in the record suggests that the statute has been enforced against them any differently than it would be against anyone else injured in the same manner. All persons, whether resident or not, injured by a county's flood control activities are prohibited from as-

serting claims against the county. All persons injured by another governmental body's flood control activities may maintain a suit against that body for such injury. Thus, appellants have not been subjected to disparate treatment.

The case of *Jones v. Helms, supra,* is analogous. There, the appellee challenged the validity of a Georgia statute which held parents who abandoned their children and left the state guilty of a felony while holding parents who abandoned their children but remained in the state guilty of a misdemeanor. The Court recognized that the statute applied equally to all parents. The Court stated:

> By its terms, [the statute] does not subject "one cast of persons to a code not applicable to another," . . . nor has appellee shown that it has been arbitrarily or discriminatorily applied. Thus, neither on the face of [the statute], nor in its application to appellee, can we detect any violation of the constitutional requirement that the State's administration of its own laws must be impartial and evenhanded.

Id. at 424 (Citations omitted). *Accord New York City Transit Authority v. Beazer, supra,* at 587-88.

III. Section 86.12.037 of the Revised Code of Washington is Rationally Related to a Legitimate Governmental Objective.

Assuming an improper statutory distinction exists, that distinction does not violate the Equal Protection Clause of the Fourteenth Amendment.

Appellants have not suggested, nor could they suggest, that the operation of Wash. Rev. Code § 86.12.037 burdens a suspect class. The classification they allege does not implicate race, nationality, or alienage. *See Graham v.*

Richardson, 403 U. S. 365, 371-72 (1971). Nor does the statute impinge upon a fundamental right. Appellants have no vested right in any common law action against a state or municipality. *Second Employers' Liability Cases*, 223 U. S. 1, 50 (1912). There is also no constitutional right to sue the government. *Parden v. Terminal Railway*, 377 U. S. 184, 186 (1963). Moreover, access to the courts is not an independent right; it is accorded special protection only when the right a claimant wishes to assert is protected. *Woods v. Holy Cross Hospital*, 591 F. 2d 1164, 1173 n. 16 (5th Cir. 1979).

Without the involvement of a suspect class or a fundamental right, courts are reluctant to overturn governmental action on the ground that it denies equal protection of the laws. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, [the Court] will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U. S. 93, 97 (1979) (footnote omitted).

In determining whether a challenged classification is rationally related to the achievement of a legitimate state purpose, the Court must affirmatively answer two questions: (1) Does the challenged legislation have a legitimate purpose? (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose? *Western & Southern Life Insurance*

Co. v. State Board of Equalization, 451 U. S. 648, 668 (1981). In answering this latter question, it is unnecessary to find that in fact the statute will accomplish its objectives. Rather, the Equal Protection Clause is satisfied if the legislature rationally could have believed that the statute would promote its objective. *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456, 466 (1981) . The question need only be debatable. *See United States v. Carolene Products Co.*, 304 U. S. 144, 154 (1938). The parties challenging the legislative judgment bear the burden of convincing the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. *Vance v. Bradley, supra*, at 111.

With respect to the Washington statutes involved here, appellants' equal protection claim thus depends upon whether a state may single out persons injured by a county's flood control activities. In making this inquiry, the state is "presumed to have acted within [its] constitutional powers despite the fact that, in practice, [its] laws result in some inequality." *McGowan v. Maryland*, 366 U. S. 420, 425-26 (1961).

The state's purpose in freeing counties from liability for flood control activities, but not other governmental bodies, is legitimate. Washington receives a substantial amount of rainfall annually. The steep gradient of the Cascade mountains, the high velocity of the rivers flowing from it, combining with the substantial amounts of rain and snowfall present grave risk of human and property loss by flooding if left unchecked. Measures intended to prevent such loss protect the public health and safety and

therefore are legitimate exercises of the state's police power. The Washington Supreme Court has repeatedly found that the legislature intended the immunity provision in § 86.12.037 to encourage counties to undertake flood control measures. *Paulson v. County of Pierce*, 99 Wash. 2d at 654; *Short v. Pierce County*, 194 Wash. 421, 430-31, 78 P. 2d 610 (1938). Therefore, the legislature's enactment of § 86.12.037 was legitimate.

Moreover, the legislature could reasonably believe that, by granting immunity for flood control activities, it would encourage those immunized to undertake such activities. The courts often have recognized that where a duty to undertake an activity does not exist, or where it would be unfair to impose such a duty as a matter of law, the activity may be encouraged by granting immunity to those being sought to conduct those activities. *See, e. g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U. S. 59 (1977) (limiting liability to nuclear energy producers); *Silver v. Silver*, 280 U. S. 117 (1929) (sustaining guest/host doctrine); *Jones v. Wyeth Laboratories, Inc.*, 457 F. Supp. 35 (W. D. Ark.) (immunizing swine flu vaccine producers), *aff'd*, 583 F. 2d 1070 (8th Cir. 1978). Moreover, immunity may also protect the political body's financial reserves thereby freeing a greater portion of its finances for devotion to the desired activities. *See Daughtry v. Arlington County*, 490 F. Supp. 307 (D. C. D. C. 1980). Thus, by granting immunity to counties the legislature reasonably could have believed that it would be encouraging effective flood control activities.

That some, but not all, of those empowered to undertake flood control measures are immune from liability is of no moment. The courts have frequently recognized that

either the nature of the one immunized, or a desire for a particular body to carry out a particular activity, may necessitate granting immunity to a class conducting activities identical to those of a nonimmune class. *See, e. g., Harris v. Pennsylvania Turnpike Commission*, 410 F. 2d 1332 (3rd Cir. 1969) (Commission liable for trespass but not negligence in constructing turnpike), *cert. denied*, 396 U. S. 1005 (1970); *Obenshain v. Halliday*, 504 F. Supp. 946 (E. D. Va. 1980) (county officials immune from proprietary acts while municipalities are not); *Meyerhoffer v. East Hanover Township School District*, 280 F. Supp. 81 (M. D. Pa. 1968) (school district immune from liability for bussing activities while private parties are not). It is rational for the legislature to have desired that counties alone assume primary responsibility for flood control activities. Granting counties immunity for those activities while not granting it to other governmental bodies is a logical means of assuring that counties will assume that primary role. Thus, that the legislature only granted immunity for a county's flood control activities does not alter the fact that Wash. Rev. Code § 86.12.037 is rationally related to a legitimate government purpose and is therefore not violative of the Fourteenth Amendment's Equal Protection Clause.

IV. There is No Conflict on This Issue Among the States.

In support of their appeal, appellants urge that a conflict exists on this issue among the highest courts of the states of Washington and Kansas. To support that argument, appellants cite the decision of *Flax v. Kansas Turnpike Authority*, 226 Kan. 1, 296 P. 2d 446 (1979). In *Flax*,

the wife of a driver killed on the Kansas Turnpike sued the Turnpike Authority for her husband's death. The Authority claimed immunity under a Kansas statute. All other governmental units were liable for negligent road design. The Kansas Supreme Court held the immunity statute unconstitutional on the grounds that:

> The [statute's] ultimate effect . . . is to create a small class of motorists who are subjected to discrimination for no other reason than they happened to take the turnpike and as a result, are deprived of a remedy granted the motorist on every other road in Kansas.

Id., 596 P. 2d at 453.

Flax is readily distinguished from the case at bar. First, *Flax* was held unconstitutional under the Constitutions of the State of Kansas and the United States. *Id.*, 596 P. 2d at 450. Thus, it does not present a conclusive example of a conflict in interpretations of the Federal Constitution because the holding rested on independent state grounds.

Second, the Turnpike Authority apparently had responsibility only for a single roadway, the Kansas Turnpike. *See Hendrix v. City of Topeka*, 231 Kan. 113, 643 P. 2d 129, 133 (1982). By contrast, the counties covered under Washington's immunity statute have responsibility for numerous and extensive flood control projects. The greater burden justifies the immunity. *See Aubertin v. Board of County Commissioners*, 588 F. 2d 781 (10th Cir. 1978).

Third, the Kansas Supreme Court subsequently noted that *Flax's* distinguishing feature was that some motorists had rights denied others. *Hendrix v. City of Topeka, su-*

pra. Where the statute affected all to an equal degree, the court upheld the immunity. *Id.* Here, § 86.12.037 confers immunity on all counties throughout the state. Every Washington citizen resides in a county. Thus, the statute affects every Washington citizen to an equal degree.

Finally, *Flax* involved immunity for road construction and maintenance, not flood control activities. The distinction is important because the burdens the governmental entity assumes are different. Roadways are easily inspected and repairs frequently are minor. Maintaining flood control projects, however, requires substantial undertakings; dredging rivers involves more work, greater cost, and higher risk than filling potholes. Additionally, roads are built as much to benefit public convenience as to protect public health and safety. Flood control projects are undertaken almost exclusively to protect public health and safety. Given these distinguishing features, courts understandably give less solicitude to a provision granting immunity to the entity constructing a state's most modern thoroughfare than to an entity constructing a flood control project. For these reasons, *Flax* is not in conflict with the ruling of the Washington Supreme Court in this case.

CONCLUSION

Appellants assert this appeal alleging that Wash. Rev. Code § 86.12.037 violates the Fourteenth Amendment to the United States Constitution because it renders counties immune for flood control activities while allowing other governmental bodies to be held liable for similar actions.

Appellants have failed to show that the statute burdens them unevenly, or that the statute is unrelated to a legitimate governmental purpose. Because appellants have failed to take this appeal in conformance with the Rules of the Supreme Court, because § 86.12.037 applies equally to all Washington residents, and because the statute reasonably furthers the legitimate governmental purpose of encouraging counties to undertake flood control activities, appellee respectfully requests this Court to dismiss appellants' appeal or, in the alternative, to affirm the Washington Supreme Court's holding in this case.

DATED this 11th day of October, 1983.

Respectfully submitted,

BURGESS, KENNEDY & FITZER, P.S.

By: KAREN L. STROMBOM

Attorney for Appellee

APPENDIX A

No. 267086

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

ROBERT PAULSON and CELESTE PAULSON, husband and wife; ERNEST POSICK and DONNA POSICK, husband and wife; GEORGE PARIS and THELMA PARIS, husband and wife; VELDON STARGEL and GLADYS STARGEL, husband and wife, and RITA HARRIS,

Plaintiffs,

vs.

THE COUNTY OF PIERCE,

Defendant.

JUDGMENT ON THE VERDICT

THE ABOVE ENTITLED MATTER having come on duly and regularly for trial on the issue of damages before the undersigned judge, sitting with a jury; the parties appearing in person or through their representatives and being represented by their respective attorneys; the jury having been sworn to try the case; evidence having been adduced on behalf of the various parties; the jury having thereafter been duly instructed on the law, after which the jury deliberated upon its verdict and found in favor of the plaintiffs in various amounts; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiffs PAULSON have judgment against the defend-

ant in the sum of Eight Thousand One Hundred Ninety and no/100—($8,190.00)—Dollars, plus said plaintiffs' taxable costs herein; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs POSICK have judgment against the defendant in the sum of Thirty Five Thousand One Hundred Sixty Eight and no/100—($35,168.00)—Dollars, plus said plaintiffs' taxable costs herein; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs PARIS have judgment against the defendant in the sum of Fifty Two Thousand Three Hundred Fifty Five and no/100—($52,355.00)—Dollars, plus said plaintiffs' taxable costs herein; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs STARGEL have judgment against the defendant in the sum of Fourteen Thousand Six Hundred Fifty Five and no/100—($14,655.00)—Dollars, plus said plaintiffs' taxable costs herein; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff HARRIS have judgment against the defendant in the sum of Thirty Thousand One Hundred Eighty Six and no/100—($30,186.00)—Dollars, plus said plaintiff's taxable costs herein.

DONE IN OPEN COURT this 17th day of October, 1980.

/s/ Donald H. Thompson
JUDGE

Presented By:

/s/ F. Ross Burgess
F. ROSS BURGESS
Attorney for Defendant